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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 Hector Lopez, an individual,

12 Plaintiff,

13 v.

14 Charles Ryan, et al.,

15 Defendants.

No. CV 13-00691-TUC-DCB

16 Enrique Montijo, an individual,

17 Plaintiff,

18 v.

19 Charles Ryan, et al.,

20 Defendants.

No. CV 13-01439-TUC-DCB

**DEFENDANTS'**  
**TRIAL MEMORANDUM<sup>1</sup>**

21  
22 Defendants Bennett and Swaney submit this Trial Memorandum to assist the Court  
23 with respect to the presentation of evidence at trial relating to the relief Plaintiffs will be  
24 allowed to pursue, including compensatory damages.

25 \_\_\_\_\_  
26 <sup>1</sup> This Motion in Limine is also being filed in CV13-0691 and is identical to that  
filing.

1 **I. Background.**

- 2 • Plaintiffs contracted botulism after consuming tainted alcohol or food; the
- 3 condition is not immediately diagnosed by medical personnel,
- 4 • Plaintiffs testified at length about the pain associated with their undiagnosed
- 5 medical conditions,
- 6 • Plaintiffs have admitted that they misrepresented to medical staff why they
- 7 thought they had become ill, stating at different times that they drank
- 8 alcoholic ‘hooch’ and that they consumed a bad sausage,
- 9 • Plaintiffs are seen by prison medical personnel but claim either that they did
- 10 not receive any medical care or that the care they received was insufficient,
- 11 • Plaintiffs ask Defendant Bennett for assistance on at least one occasion
- 12 while they are sick. But since Bennett was present at least twice when
- 13 escorting nurses to Plaintiffs’ cell-front, and he is aware that nurses have
- 14 been seeing the Plaintiffs at least twice per day at their cell fronts, he does
- 15 not go directly to the medical unit, believing that they have already been
- 16 seen earlier that day,
- 17 • Defendant Swaney enters the Plaintiffs’ pod during an inmate disturbance,
- 18 at which time they attempt to get his attention. After the disturbance
- 19 concludes, Swaney confirms with staff that nurses have been regularly
- 20 seeing the Plaintiffs in order to attend to their medical needs,
- 21 • In their depositions, Plaintiffs were asked how they calculated their
- 22 damages, but they declined to provide meaningful answers. (*See* Lopez
- 23 deposition transcript at 187 -195 and Montijo deposition transcript at 135 -
- 24 138, annexed hereto as Exhibits A and B, respectively.)
- 25 • Plaintiffs have never disclosed any evidence or proposed any way to
- 26 calculate the harm Bennett and/or Swaney caused them, since they were

1 already sick and had been seen by medical staff on multiple occasions  
2 before the Defendants encountered them.

- 3 • Plaintiffs have never disclosed any evidence, and certainly no medical  
4 evidence or expert testimony, that they suffered any disability,  
5 disfigurement, or loss of enjoyment of life.

## 6 **II. Plaintiffs Have Not Disclosed Evidence that Defendants Actually Harmed** 7 **Them.**

8 Unlike an injunction claim, an inmate's claim for damages survives his release  
9 from prison. *Rhodes v. Robinson*, 408 F.3d 559, 566 n.8 (9th Cir. 2005); *McQuillion v.*  
10 *Schwarzenegger*, 369 F.3d 1091, 1095-96 (9th Cir. 2004). However, a jury's damages  
11 award must be based upon evidence and not upon speculation, guesswork or conjecture.  
12 *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir.  
13 1996) (concluding that a district court "must uphold the jury's finding unless the amount  
14 is grossly excessive or monstrous, clearly not supported by the evidence, or based only on  
15 speculation or guesswork"); *see also* 9th Circuit Model Jury Instruction 5.1.

16 To establish "deliberate indifference" to a serious medical need, the prisoner must  
17 demonstrate: "(a) a purposeful act or failure to respond to a prisoner's pain or possible  
18 medical need, and (b) *harm caused by the indifference.*" *Jett v. Penner*, 439 F.3d 1091,  
19 1096 (9th Cir. 2006) (emphasis provided). An inmate plaintiff can show a defendant is  
20 deliberately indifferent under this standard "only if the official 'knows of and disregards  
21 an excessive risk to inmate health and safety.' " *Jett*, 439 F.3d at 1096 (quoting *Toguchi*  
22 *v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). "Mere negligence in diagnosing or  
23 treating a medical condition, without more, does not violate a prisoner's Eighth  
24 Amendment rights." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1992). Plaintiffs  
25 have not disclosed competent expert testimony or other evidence that prison medical staff  
26 was negligent in diagnosing or treating them.

1        Additionally, mere delay of medical treatment, “without more, is insufficient to  
2 state a claim of deliberate medical indifference.” *Shapley v. Nevada Bd. of State Prison*  
3 *Com'rs*, 766 F.2d 404, 407 (9th Cir.1985). A delay in treatment must have caused  
4 substantial harm in order to constitute an eighth amendment violation. *See id.* Plaintiffs  
5 have not disclosed medical evidence that the time it took for their conditions to be  
6 diagnosed or the treatment they received for their symptoms fell below the standard of  
7 care or that they required emergency attention at a time when either Defendant was aware  
8 of their situations. *Cf. Broughton v. Cutter Laboratories*, 622 F.2d 458, 460  
9 (9th Cir.1980) (delay of six days in treating hepatitis may constitute deliberate  
10 indifference). Nor did they produce competent evidence that any delay in treatment  
11 substantially harmed Plaintiffs, considering that medical staff had admittedly been unable  
12 to diagnose their conditions. *Cf. Hunt v. Dental Department*, 865 F.2d 198, 199 (9th  
13 Cir.1989) (three month delay in replacing dentures, causing gum disease and possibly  
14 weight loss constituted eighth amendment violation). The Plaintiffs therefore cannot  
15 show that the purported delay in their diagnosis and treatment caused them cognizable  
16 harm.

17        The Plaintiffs have not only failed to produce any probative evidence to support a  
18 claim for actual damages against Defendants Bennett and Swaney, they have admitted  
19 that they caused themselves to contract botulism by consuming either tainted food or  
20 drink. Thus, it is undisputed that the Plaintiffs’ own actions caused them harm. It is also  
21 undisputed that prison medical staff was aware that Plaintiffs were ill before Bennett or  
22 Swaney. Although the Plaintiffs blame medical staff for ignoring their complaints, they  
23 have not disclosed expert testimony that prison medical staff provided was substandard.  
24 Without evidence to support a claim that the care Plaintiffs received was substandard,  
25 they have resorted to arguing, contrary to the evidence in the record, that prison medical  
26

1 staff ignored completely their complaints. They have not, however, shown that Bennett  
2 or Swaney knew that medical personnel were not treating them at all as they now claim.

3 To the extent that medical personnel had difficulty diagnosing the Plaintiffs'  
4 conditions, they have disclosed no probative, expert evidence suggesting that the time it  
5 took to diagnose them with botulism was unreasonably long or that the care they received  
6 while their condition was undiagnosed was inadequate. Likewise, they have not disclosed  
7 any medical evidence that prison medical personnel were deliberately indifferent to their  
8 serious medical needs. Perhaps realizing that they had no evidence to support a claim that  
9 the care they received was substandard, the Plaintiffs allege instead that prison medical  
10 staff completely ignored their requests for medical assistance—all without bringing any  
11 deliberate-indifference claims against the medical staff. It follows that Plaintiffs are  
12 acknowledging that they harmed themselves and that medical staff ignored them,  
13 exacerbating their harm. What possible additional harm could Bennett and Swaney have  
14 caused under these circumstances? After all, during the few isolated instances when they  
15 each may have been able to observe the Plaintiffs, the Defendants knew that they would  
16 be seen again the next time the nurses toured their pod while doing medication checks.

17 Plaintiffs have never disclosed anything beyond their own unfounded, self-serving  
18 speculation to support their claim for damages against Defendants. They have steadfastly  
19 refused to disclose any evidence from which a jury could reasonably allocate any  
20 damages to the Defendants given the fact that the Plaintiffs were already sick when they  
21 encountered Bennett and Swaney, who knew they were being seen and monitored by  
22 medical staff. Plaintiffs complain that they were not seen by a doctor. But, it would be  
23 pure speculation to conclude that Plaintiffs would have been diagnosed sooner or that  
24 their care would have ameliorated if Bennett or Swaney had acted differently. Plaintiffs  
25 have not identified any specific additional harm that they or medical staff did not cause.

1 Since the Plaintiffs should be required to present evidence of actual injuries or  
 2 damages with some specificity and they have declined to do so, they should not be  
 3 permitted to speculate that they incurred heretofore undisclosed additional harm as a  
 4 result of Defendants' actions. And, insofar as Plaintiffs may argue that they can testify as  
 5 to the additional harm they believe the Defendants caused, the Court should reject that  
 6 proposition due to their failure to provide timely discovery on the issue and because their  
 7 testimony would be, by its very nature, speculative. After all, they were already sick and  
 8 being seen by medical staff before they encountered Bennett or Swaney.

9  
 10 **III. Since Montijo Was in Custody When He Filed Suit and Defendants Did Not  
 Physically Harm Him, He Cannot Recover Damages for Emotional Harm.**

11 With respect to Plaintiff Montijo's claims only, he was incarcerated when he  
 12 brought this action. (Dkt. 1-3 at 2, ¶ 1.) Thus, although compensatory damages may  
 13 generally include not only out-of-pocket expenses and other monetary harms, but also  
 14 such injuries as "personal humiliation, and mental anguish and suffering," *Memphis*  
 15 *Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986), that is not the case here  
 16 where the PLRA applies. Under the PLRA, to obtain damages for emotional distress, a  
 17 prisoner must demonstrate physical injury:

18 No Federal civil action may be brought by a prisoner confined  
 19 in a jail, prison, or other correctional facility, for mental or  
 20 emotional injury suffered while in custody without a prior  
 showing of physical injury.

21 42 U.S.C. § 1997e(e). This provision "requires a prior showing of physical injury that  
 22 need not be significant but must be more than de minimis." *Oliver v. Keller*,  
 23 289 F.3d 623, 627 (9th Cir. 2002); accord *Jackson v. Carey*, 353 F.3d 750, 758  
 24 (9th Cir. 2003).

25 Thus, since Plaintiff Montijo has neither pleaded nor shown that anything the  
 26 Defendants did caused him a physical injury which, in turn, caused him to suffer mental

1 or emotional harm, he should not be permitted to offer testimony or other evidence at trial  
2 relating to claimed mental or emotional injuries. Indeed, since Plaintiffs have not  
3 produced medical or any other competent evidence to support their claim that Defendants  
4 caused them emotional harm, Defendants object to their attempting to do so at trial, based  
5 on lack of foundation, lack of timely discovery, and because such evidence would be  
6 more prejudicial than probative under Fed. R. Evid. 403.

7 Plaintiffs have not provided written discovery or disclosed medical testimony with  
8 proper foundation indicating that they suffered from emotional harm separate and apart  
9 from that they were already suffering as a result of their undiagnosed medical condition.  
10 Thus, even if this was not a PLRA case with respect to Montijo, the Court should  
11 foreclose Plaintiffs from presenting any evidence to show that the matters at issue caused  
12 him emotional harm.

13 **IV. Conclusion.**

14 Based on the foregoing, Defendants Bennett and Swaney respectfully submit that  
15 Plaintiffs' deliberate indifference claims against them must fail because Plaintiffs have  
16 failed to disclose evidence and will not be able to establish with sufficient specificity that  
17 Defendants actually harmed them. Thus, if the jury were to find in favor of Plaintiffs on  
18 both remaining Counts, their damages recovery should be limited to nominal damages.

19 RESPECTFULLY SUBMITTED this 10th day of January, 2020.

20 MARK BRNOVICH  
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22 s/Paul e. Carter  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of January, 2020, I electronically filed the foregoing Document with the United States District Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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